HON'BLE SRI JUSTICE P.S.NARAYANA

+ WRIT PETITION No.19790 of 2007

% Dated 02-11-2007

Between:
Kolluri Suresh Rani

…. Petitioner

And
The Andhra Bank, Rep.by its Chief Manager,
Dilsukhnagar, Hyderabad and another

… Respondents

! Counsel for the Petitioner: Sri K.SUNEEL BABU

^Counsel for Respondent Nos.1 & 2: Sri K.LAKSHMINARASIMHA

<GIST:

> HEAD NOTE:

? Cases referred

1. (2006) 10 Supreme Court Cases 201
2. 2005-BCR-1-276: 2005 (TLS) 1317360
3. 2004 (4) ALT 4 (SC)

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD
(Special Original Jurisdiction)

FRIDAY THE SECOND DAY OF NOVEMBER
TWO THOUSAND AND SEVEN

PRESENT
THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION No.19790 of 2007

Between:
Kolluri Suresh Rani … Petitioner

And:
The Andhra Bank,
Rep.by its Chief Manager,
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THE HONOURABLE SRI JUSTICE P.S.NARAYANA

WRIT PETITION No.19790 of 2007

ORDER:

1. Heard Sri Girishkumar, representing Sri Suneel Babu, and Sri Lakshmi Narasimha, the standing counsel representing the respondents.

2. Sri Girishkumar, the learned counsel, representing the writ petitioner, has taken this Court to the contents of the affidavit filed in support of the writ petition and also the counter affidavit, and would maintain that though certain representations were made, without considering the representations and without passing any order, the further proceedings had been taken and the same is bad in law. The learned counsel also had explained the contents of the better affidavit and would maintain that in the facts and circumstances of the case, the impugned order to be quashed and respondents to be directed to pass reasoned order on the representations and then proceed further with the matter, in accordance with law. The learned counsel also would

maintain that in the case of this nature, the availability of alternative remedy may not come in the way. The learned counsel also placed strong reliance on some decisions.

3. On the contrary, Sri Lakshmi Narasimha, the learned standing counsel, representing the respondents, would submit that as far as the movables, if any, are concerned, the petitioner is at liberty to take such movables, since the respondents have nothing to do with the said movables. The learned counsel also further explained that as far as steps to be followed and procedure to be followed had been followed, in accordance with law. Even otherwise, the petitioner is having an effective alternative remedy, and hence the writ petition is not maintainable and the same is liable to be dismissed.

4. Heard the learned counsel on either side and perused the material available on record.

5. The writ petitioner filed the present writ petition for writ of certiorari to quash the impugned notice dated 21.05.2007 issued by the 2nd respondent under Sec.13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “the Act” for the purpose of convenience) declaring the same as arbitrary, illegal, null and void and in violation of the provisions of the Act referred to supra and direct the respondents to deliver possession of the house property bearing House No.18-155/B, situated at Road No.5, Kamalanagar, Dilsukhnagar, Hyderabad which is in possession of the respondents

bank and to pass other suitable orders.

6. In the affidavit filed in support of the writ petition, it is stated that the petitioner approached the Karnataka Bank for grant of loan for setting up business of manufacturing coconut oil in the year 2001 and submitted an application for the same. The Manager of the said Bank accepted her application and sanctioned a loan under over cash credit fixing a limit of Rs.8,00,000/-. Thereafter, the petitioner started the business and out of the income, which she derived out of the business, she was paying the amounts borrowed from the Bank regularly without any default. It is further stated that the petitioner never exceeded the limit of Rs.8,00,000/- fixed by the Bank under over cash credit facility and though she has requested the Manager of the said Bank to enhance the limits as she was doing good business and also to diversify her business but the Manager refused to do it. In the year 2006 the 1st respondent Bank has taken over the Karnataka Bank as a result of which all the transactions relating to Karnataka Bank were stood transferred to the Andhra Bank. After such taken over of the Karnataka Bank by the 1st respondent bank, she approached the 2nd respondent and requested him to enhance over cash credit limit to 20 lakhs for the reason that she has established a flour mill for manufacture of various flours and that she has orders on hand of various customers to the tune of 40 lakhs and also requested the 2nd respondent to verify her bank account transactions and only after getting satisfied by the past transactions it can take steps to enhance

the over cash credit limit.

7. It is further stated that the 2nd respondent on being satisfied with the past record of the petitioner, enhanced the over cash credit limit to 15 lakhs and also a term loan was granted to her to the tune of Rs.3,00,000/-. Ever since the petitioner established the flourmill and she was availing the facilities granted by the 2nd respondent Bank. The petitioner was doing good business and was paying the borrowed amounts without any default. While so, due the sudden unfortunate turn of events, the petitioner had to shut down her flour mill and had to shift the same to another premises due to which she could not carry on her business as a result of which she incurred heavy loss. In fact, the petitioner gave in writing a representation to the 2nd respondent Bank of the above unfortunate events but the 2nd respondent Bank without considering the same started issuing notices for repayment of the loan amount which culminated into issue of Notice dated 17.04.2007 under Sec.13 of the Act read with Rule 4(5)(c)(iii) of Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as “the Rules” for the purpose of convenience) directing her to deliver the possession of the property mentioned interest he said notice immediately. On receipt of the said notice, the petitioner approached the 2nd respondent bank to grant her some time for payment of the demanded amount but the 2nd respondent refused to grant the same and instead issued Notice under Sec.13(2) of the Act on 21.05.2007 calling upon her to repay the loan amount of Rs.12,13,216.64 ps. in over cash credit and amount of

Rs.2,69,664/- in term loan totaling Rs.14,82,880-64 ps as on 30.04.2007 or else they will take over the possession of the property as per the provisions of the Act. Again on receipt of the said notice, the petitioner approached the 2nd respondent Bank and requested him to grant some more time to repay the borrowed amount and further requested him to consider the above said facts. The 2nd respondents assured her that they will not take any coercive steps and that sufficient time will be granted to her for repayment of the said loan amount. It is further stated that after receiving the said notice, the petitioner has brought down the outstanding amounts from Rs.14,00,000/- to Rs.11,00,000/- and she was taking every possible steps to repay the borrowed amounts. In fact, the petitioner has hypothecated valuable assets worth Rs.60,00,000/- to the respondent bank and requested them that in the event of her inability to repay the amount they can take necessary steps for realizing the loan amount.

8. It is further stated that the respondents without considering the petitioner's request on 24.08.2007 the 2nd respondent deputed four officials of the bank who high handedly dispossessed the petitioner from the house in inhuman manner at 1 PM in the afternoon and locked the house property. It is also stated that the respondent bank officials in an inhuman way thought the petitioner pleaded that her two children are coming for having lunch, did not allow her to stay in her house and physically pushed her out and locked the house without allowing her to collect her belongings. The petitioner was thrown out

of her house with just clothes on her body and in the result, the petitioner, her husband and her two daughters aged about 11 and 15 are on roads and are in depressed state and even if she has to settle the account all the records are inside the house.

9. It is stated that the notice issued by the 2nd respondent is not in accordance with law, since the 2nd respondent is not an authorized officer. Further it is stated that the respondents did not comply with the formalities prescribed under Rules 4 and 8 of the Rules for taking possession and hence the action taken by the respondent Bank is illegal. Further the impugned notice did not contain the calculation of the amount and no statement of accounts had been enclosed so as to enable the petitioner to verify the same. It is further stated that the notice under Sec.13(2) of the Act should be published in two widely circulated newspapers of which one should be in vernacular language before actual possession of the property is taken and this was not complied with the respondent bank. It is also stated that under the Act the secured creditor can invoke the provisions for enforcement of the security interest only after registration of security interest in Central Registry set up for the purpose. Since the registration of the security was not created over the properties of the petitioner, the proceedings initiated under the Act are null and void.

10. It is further stated that as per Sec.14 of the Act the respondent bank has to make a representation to the District Magistrate to issue order to take possession of the property from the

defaulter and to deliver the possession of their officials by enforcing the powers conferred under Sec.14 of the Act. In such circumstances, it is stated that the petitioner has left with no other option except to approach this Court by praying appropriate reliefs.

11. WPMP No.26211/2007 is filed praying to grant leave to the petitioner to file better affidavit and leave was granted on 27.09.2007. In the better affidavit filed, the petitioner narrated the particulars, no doubt furnishing certain further details. However, certain factual details relating to sanction of loan and other particulars may not be very essential.

12. In paragraph-6 of the better affidavit, the writ petitioner had stated that she used to pay the term loan instalments regularly from the date of allotment till March, 2007. It is stated that in the month of January, 2007 the petitioner was issued a notice under the Act asking her to repay the entire amount under over cash credit account. The husband of the petitioner met the Chief Manager of the bank and requested him to provide the time to repay the amount. The Chief Manager of the Bank was pleased and agreed to make the payment later. The petitioner paid an amount of Rs.1,10,000/- on 25.01.2007, Rs.10,000/- on 23.03.2007, Rs.40,000/- on 25.03.2007 and Rs.93,000/- on 30.03.2007. After receiving these amounts the Bank seized the over cash credit account of the petitioner for the reasons best known to them and the same was not informed either to the petitioner or her husband.

13. It is further stated that on 17.04.2007 the Chief Manager

Mr.K.S.Janardhan Rao issued a notice under Sec.13 of the Act read with Rule 4(5)(c)(iii) of the Rules to the petitioner, her husband and her brother, asking them to hand over the position of the properties which gave as collateral security. It is stated that the husband of the petitioner went to the Bank and met the Chief Manager of the Bank and enquired about the notice dated 17.04.2007. The Chief Manager said that these are all formal notices and also said that they need not worry about these notices and asked them to pay an amount of Rs.2,00,000/- and the balance amount may be paid later. The husband of the petitioner requested some time to pay that amount. The Chief Manager agreed for the same and gave a time up to the end of September, 2007. The husband of the petitioner is in segregating the funds of Rs.2,00,000/- to pay. Having agreed and granted time till September, 2007 for part payment of Rs.2,00,000/-, the Chief Manager again issued a possession notice dated 21.05.2007 arbitrarily with an ulterior motive. After receiving the notice, the husband of the petitioner again met the Chief Manager and asked about the notice. The Chief Manager again said that this is a formal notice and asked her husband to run the business promptly and repay the amount of Rs.2,00,000/-. The husband of the petitioner also met the higher authorities of the Bank in head office regarding the same and they also said the same and asked them to follow the Chief Manager. Having belief over the words of the Chief Manager, her husband was doing business and raising the funds to repay the amount to the over cash credit account.

14. It is also stated that even after paying an amount of Rs.2,53,000/- after issuing the notice on 17.01.2007 to prove the *bona fide* of the petitioner to pay the loan amount and clear her over cash credit limits which were used, on 23.08.2007 at 8.30 a.m. about 5 persons came to her home and directed them to vacate the premises and they want to attach the property. It was a shock to them and surprise to hear those words from them. They said that this action of attachment is only to heat up the issue and if she had a talk with chief manager the problem will be solved. Having known that the chief manager is not in the bank and was on leave they misguided her and forcibly took a request letter seeking time to vacate till 24.08.2007. Having no other option, her husband wrote a request letter.

15. It is further stated that on 24.08.2007 at about 13 hours when the husband of the petitioner is in the zonal office of the bank, 5 persons along with panel advocate by name Mr.Madhusudanacharlu came to her house and dragged her out from the house and locked the house. Though she asked them why they are doing all these things and who are they, then they informed her that they came from the Bank and they are attaching the house. When they came to her house, she was performing pooja as it was the last Friday and doing the Varalakshmi Vratam. Though she requested them to give her some time to provide lunch to her two daughters as it is the time to come from school for lunch and meanwhile her husband also will come from Zonal office as he went to settle the issue with the bank higher

officials.

16. It is further stated that even after the request made by the petitioner, they behaved very rudely and behaved like gundas and used very filthy language and scolded her and her husband with very ugly words and made lot of mess in the street. They have not behaved at least as human beings and did not allow her to take clothes and also did not allow her to serve food to her hungry children. They threatened her life and forced her to sign on the white blank papers and thrown her out of the house and locked the house. It is stated that there are so many perishable items and valuables in her house and so many articles in her house. Her husband brought an amount of Rs.1,00,000/- before night to make the part payment in the bank on Saturday and the same was kept in the house in puja room and they are so many gold articles also. They did not even allow her to take that amount also. When she informed about that to Mr.Madhusudhanacharlu, he scolded her in filthy language and want to open the lock and enter into the house and lock it from inside the house and do not want to allow them to do their work. They did not even noted down the articles lying in the house and not done the panchanama at all. Though she asked them to provide the attachment papers they refused to give a single paper of attachment and the orders of attachment but physically thrown her out of her house and locked it. The action of the people who came to her house on that day is very high handed and untenable and they are liable to be punished under law. They did not even follow the procedure under the law to

attach the property.

17. Further it is stated that the petitioner, her two daughters who came from school were standing on road till her husband came from zonal office and after his arrival they took shelter in one of our relative's house. The husband of the petitioner approached the police station to lodge a complaint against the barbaric action of the people who came on 24.08.2007. Though her husband requested the station house officer, Saroornagar to take complaint but the station house officer refused to take complaint for the reasons best known to them. As the police is not taking complaint, her husband sent the same through the registered post to the Circle Inspector, Saroornagar Police Station, Hyderabad.

18. Further it is stated that the petitioner also approached the Borrowers Association to complain about the issue. The association in turn directed her to meet M/s.Janardhana Associate Bangalore. M/s.Janardhana Associates gave a notice dated 27.08.2007 to the Chairman and Managing Director, Andhra Bank Head Office, Hyderabad stating all the facts and barbaric action taken by their bank staff in guidance of their Chief Manager Mr.Janardhana Rao, Dilshuknagar branch. But till date the bank higher officials did not take any action against the persons who misbehaved with her and physically thrown her out of her house or the person who guided them to do so. The bank gave an evasive reply dated 02.09.2007.

19. Several factual details are narrated in paragraphs-13, 14 and

15. It is also stated that the notice under the Act was given in the month of January, 2007 without even marking her account NPA or seize the over cash credit account. As on date of notice under the Act her account was a running account and the transactions were doing and the bank did not close her account or made it NPA. In those circumstances, her husband believed the words of Mr.Janardhan Raod who is the Chief Manager of the Bank, Dilshuknagar Branch who assured them that it was only a formal notice and if she keep on paying the amounts he will not take any steps on it and since the account was in operation and not been closed, they have not issued any reply to that notice and paid Rs.2,53,000/- to over cash credit account till March,2007.

20. Further it is stated that the petitioner paid an amount of Rs.93,000/- on 30.03.2007 the bank had made her account NPA without any further notice or intimation and issued possession notice on 17.04.2007, her husband went to the branch and asked the Chief Manager of the Bank about the notice and to her surprise, her account was made NPA by that time and Mr.Janardhan Rao who is Chief Manager assured them it is only formal notice as per rules but no action will be taken by the bank and directed them to pay another Rs.2,00,000/- by the end of September, 2007 and promised to regularize her account from NPA.

21. Several other grounds just similar to what have been raised in the affidavit filed in support of the writ petition had been reiterated, and the reliefs also had been modified. The petitioner, modifying the

relief, prayed for direction to the respondents to deliver possession of the house property in question and for such other suitable orders.

22. In the counter affidavit filed by the respondents, which was sworned by the Chief Manager of the Andhra Bank, it is averred that M/s.S.R.Traders, situated at D.No.18-155/B Road No.5, Kamalanagar, Dilsukhnagar, Hyderabad, a proprietary concern represented by Smt.K.Suresh Rani, the petitioner, has approached the respondent Andhra Bank, Dilsukhnagar Branch, Hyderabad Metro for take over the concern's credit limits from the Karnataka Bank Ltd. Dilsukhnagar branch and requested for fresh limits with respondent Andhra Bank Dilsukhnagar Branch, Hyderabad. The respondent branch has accepted her request and informed the petitioner vide letter No.0122/18 dated 6.10.2004. The activity with which the petitioner asked for the above loan is for Idly Rava Making Unit. On the petitioner's request, the said account was taken over with enhancement of limits from Karnataka Bank on 6.10.2004. The limits with Karnataka Bank Ltd. on the said date stood as Rs.8 lacs. The respondent Andhra Bank, Dilsukhnagar Branch sanctioned over cash credit limit of Rs.14 lacs. and term loan of Rs.3 lacs. The terms and conditions for the sanction of the above loan is as under:

	Cash Credit	Term Loan
Limit	14 Lacs	3 Lacs

Purpose	Working Capital Limits	New Machinery of Industrial air compressor, Electronic Ejective valves and other accessories (for the proposed second hand imported colour sorter to be purchased)
Security	Stock in trade i.e. Raw Material of boiled Rice, Finished Goods of Idly Rava, Basin Chakki Atta and other pulses & dalls and packing material and sundry debtors below 90 days	Proposed new machinery with the proposed second hand imported colour sorter at an estimated cost of Rs.12 lacs.
Margin	25% against stocks, 50% against sundry debtors	25% against proposed new machinery
Repayment	Due date one year: 5-10-2005	20 quarterly installments commencing from March, 2005 (interest shall be paid every month as and when the same is debited to the account)

Collateral Security

Owner	Description	Value	Date of valuation
K.Suresh Rani (Proprietor of the firm)	House No.18/155B, Road No.5, Kamalanagar, Dilsukhnagar, Hyderabad	13.64 lacs	17-8-2004

Sri V.Rama Mohan Rao	Open plots No.718 & 719 with teak plantation of 480 sq.yards in Survey No.63, 64, 67, 68 and 69 at Maruthi Nagar colony, Aushapur village, Ghatkeswar Mandal, R.R.Dt.	2.40 lacs	13-9-2004

The bank has revalued the house property at Rs.16.98 lacs on 19.12.2005 and the open plots at Rs.2.40 lacs on 18.12.2006. The total value of the properties comes to Rs.19.38 lacs.

Co-Obligants:

1. Sri K.Venu Babu, Husband of Proprietor of the Firm
2. Sri V.Rama Mohan Rao, Owner of one of the Collateral securities.

23. The cash credit limits were renewed on 3.4.2006 and the due date of the limit is 2.4.2007. As sufficient stocks were not available and the over dues in the term loan account, the Branch has declared the accounts as NPA on 30.12.2006 as RBI Prudential Norms. At the time of NPA the total liability is as under:

Account	Account Balance (Rs. In lacs)	Uncovered interest	Total liability (Rs.in lacs)
OCC	13.93	0.12	14.06
Term Loan	2.52	0.04	2.56
Total	16.45	0.16	16.62

The recoveries after the date of NPA are as follows:

Date of Recovery	Amount of Recovery (Rs in lacs)
25-1-2007	1.10
23-3-2007	0.10
26-3-2007	0.40
30-3-2007	0.43

30-3-2007 0.50
Total 2.53

Despite repeated requests the petitioner did not repay the loan taken. They give below the dates on which notices were given to the petitioner which were acknowledged by the petitioner. The respondent bank has served the notices under the Act as follows:

Notice	Date of Notice	Acknowledged by the petitioner
Securitisation Notice	10-1-2007	10-1-2007
Possession Notice	17-4-2007	20-4-2007
Hand over of the property refused on	--	22-5-2007
Sec.14 petition filed on		13-6-2007
Date of Advocate Commissioner appointed by the Court		Crl.MP No.266 of 2007 dated 16-8-2007
Possession taken by the Advocate Commissioner Sri N.Krishnaiah appointed by the Court		24-8-2007
Possession given by the Advocate Commissioner to the Bank on		28-8-2007

The outstanding liability as on 28-8-2007 (interest calculated upto 31-7-2007) (Rs.in lacs)

Account No.	Account Balance	Un recovered	Interest	Total liability
OCC	11.93	0.70		12.63
Term Loan	2.53	0.27		2.80
Total	14.46	0.97		15.43

24. It is also stated that the petitioner had not repaid the loans and defaulted. The petitioner vide letter dated 29.09.2006 addressed to the Chief Manager, Andhra Bank, Dilsukhnagar Branch, Hyderabad had given an undertaking to regularize the accounts and undertook to repay the term loan over due instalments within one month from 31.10.2006. This was followed by another request on 23.1.2007. Although several opportunities were given to the petitioner to repay the loan amount, it was not done an the loan instalments etc. remained outstanding. Since no useful purpose would be served and since the writ petitioner did not repay the loan amount, the respondent bank has taken steps under the Act to enforce their valuable legal right by giving notices. The respondent bank had followed the procedure under the Act. Further it is stated that on 23.08.2007 Mr.N.Krishnaiah, Advocate Commissioner appointed by the court and on his request Mr.Madhusudhana Charyulu, Panel Advocate of respondent bank and concerned staff members went to the premises of the firm to execute the warrant issued to take the possession of the above property of the borrower offered as security for the loans availed by the borrower. The Advocate Commissioner had contacted the borrower i.e. the petitioner at about 8 AM and requested her to hand over the vacant possession of the property by 2 PM. Again the Advocate Commissioner contacted the borrower at 2 PM for taking possession of the property. The borrower requested the Advocate Commissioner to give time upto 5.30 PM and again requested the Advocate Commissioner in writing for some more time to vacate the premises and sought for time upto 8 AM on 24.08.2007. In deference to their request the advocate commissioner permitted and advised the borrower to hand over the property in vacant possession on 24.8.2007 at 8 AM. On 24.8.2007 the advocate commissioner and Sri Madhusudana Charyulu and the

Bank staff, who accompanied the advocate commissioner on his request, contacted the borrower. The advocate commissioner requested the borrower to vacate the premises and hand over the same. The Advocate commissioner requested Mr.Suresh Rani, petitioner herein to take items and vacate the house. The petitioner borrower is duty bound to obey the orders of the Court and ought to have vacated and handed over the property to the advocate commissioner as per Court orders. The petitioner instead of obeying the orders of the Court started acting contrary to the orders of the Court and started abusing the Court as well as the Advocate Commissioner. In any case, as per the Court order, the Advocate Commissioner started inventorying the items and articles in the presence of Smt.Suresh Rani, the petitioner herein, and her husband Mr.Venu Babu. After the inventory is completed, the writ petitioner has signed voluntarily in presence of two more persons. Later the Advocate Commissioner in obedience to the orders of the Court has sealed the premises. On 28.08.2007 the Advocate Commissioner, as per the orders of the Court, had handed over the keys of the premises to the respondent bank.

25. It is further stated that the husband of the petitioner Sri K.Venu Babu along with another person (friend), who has informed that he is Deputy Superintendent of Police, requested the Advocate Commissioner to grant time for payment and resisted the execution of the warrant. They visited the Zonal office of the Bank on 24.08.2007 at 10.15 AM and requested for further time for repayment with the Deputy General Manager and Chief Manager (Legal and RMD). His request was not considered as 8 months time has elapsed from the date of notice given under Sec.13(2) and further since the Advocate

Commissioner has already executed the warrant.

26. Several other averments also had been specifically denied. The specific stand taken by the respondents that the petitioner had an effective alternative remedy under Sec.17 of the Act.

27. Submissions were made at length by the respective counsel on record. Further, emphasis was laid in regard to maintainability of the writ petition and in regard to the alternative remedy available to the petitioner and in support thereof, placed strong reliance on the decision of the Apex Court in ***Star Paper Mills Ltd. vs. State of U.P.and others***[1] where it was held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court may consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

28. Further strong reliance was placed on the decision of the High Court of Bombay in ***M.R.Gawai Enterprises vs. Vidarbha Urban Co-operative Bank Limited***[2] wherein the Division Bench of the Bombay High Court observed at paragraphs-4, 5 and 6 as hereunder:

> Considered the contentions canvassed by respective counsel. Perused the judgment of the Apex Court. The controversy in issue is concluded by the judgment of the Apex Court in the above referred decision and the relevant observations of the Apex Court in paragraph 80 of the

judgment read thus:- “80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under section 13 (4) of the Act have been taken, a mechanism has been provided under section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find that emerges from different provisions of the Act, is as follows:-“ 1. Under sub-section (2) of section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under section 17 of the Act, at that stage.”

In view of the above referred observations of the Apex Court, it is evident that after service of notice under section 13 (2), if the borrower raises any objection or places facts for consideration of the secured creditor, such as respondent No.1, such objection/reply to the notice must be considered with due application of mind and the reasons for not accepting the objection, however brief they may be, must be communicated to the borrower. In the instant case, admittedly, the petitioner’s objection to the notice, dated 9th September, 2003, was neither considered by respondent No.1, nor there is any reasoned order passed by respondent No.1 for rejecting the said objection. Petitioner was also not communicated the decision on the objection by respondent No.1. It appears that since the petitioner approached this Court by filing the present writ petition under Article 226 of the Constitution of India and this Court, vide order, dated 21st November, 2003, prevented respondent No.1 from taking actual possession of the property pursuant to the notice, dated 9th September, 2003 no action under sub-section (4) of section 13 of the Act could be taken against petitioner.

In view of the law laid down by the Apex Court, respondent No.1 is now directed to reconsider the objection, dated 7th November, 2003, submitted by the petitioner to the show-cause-notice, dated 9th September, 2003, afresh and if the respondent No.1 rejects the same that should be by a reasoned order and the grounds for rejection be communicated to the petitioner.

29. Placing strong reliance on the decision of the Division Bench, contentions were advanced that without considering the representations and also without passing a reasoned order, proceeding further in haste and hurried manner, cannot be sustained.

30. Further strong reliance was placed on the decision of the Apex Court in ***Mardia Chemicals Ltd. v. Union of India***[3]. The relevant paragraphs, which have been pointed out by the learned counsel for the petitioner are hereunder:

"In the background we have we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures

under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavory steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the Court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to known the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act."

"However, to a very limited extent jurisdiction of the civil Court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil Court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the *Union of India, namely v. Narasimhachariar* (4 supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as

follows in para 22:

"The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: *Adams v. Scott, (1859)* 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annual one of the chief securities on which persons advancing moneys on mortgages rely. (See Rashbehary Ghose Law of Mortgages, Vol.II, Fourth Edn., page 784)."

"Arguments have been advanced as to how far principles of lender's liability are applicable. Whatever be the position, however, it cannot be denied that the financial institutions namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact as to whatever may have been held in decisions of some American Courts, in view of the facts and circumstances and the terms of the contract and other details relating to those matter, that may or may not strictly apply, nonetheless even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of concept of lender's liability. It cannot be a one-sided affair shutting out all possible and reasonable remedies to the other party, namely borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies

on the part of the banks and financial institutions."

"Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with his conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition at it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Sec.17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil Court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage

enforceable without intervention of the Court.

31. It is no doubt true that the financial institutions are expected to follow the procedure as per the provisions of the Act. It is also true that the Division Bench of the Bombay High Court in the decision of ***M.R.Gawai Enterprises vs. Vidarbha Urban Co-operative Bank Limited*** (2 supra) made certain observations that the rejection not to be arbitrary and certain reasons are to be recorded.

32. In the light of the letter placed before this Court, repeated requests were made for discharging the loan, and in such a case, in the light of the specific stand taken in the counter affidavit that several opportunities had been given and since the petitioner was not inclined to discharge the same, the further steps under the provisions of the Act had been taken, this Court of the considered opinion that inasmuch as certain factual controversies are being raised, it would be appropriate if an opportunity is given to the petitioner to pursue the remedy by way of appeal, in accordance with Sec.17 of the Act. However, it is stated that certain representations had been made, and in the event of the petitioner ready and willing to pay the amounts, the respondents to consider the same in the light of the facts and circumstances of the case by entering into the rescheduling, if need be. Except making these observations, no further relief as such can be granted in this writ petition.

33. The Writ Petition is, accordingly, disposed of, with the above observations. No order as to costs.

P.S.NARAYANA,J

Dated: 02.11.2007
Dsr

Note:
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[1] (2006) 10 Supreme Court Cases 201
[2] 2005-BCR-1-276 : 2005 (TLS) 1317360
[3] 2004 (4) ALT 4 (SC)